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NO. _____

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT J. HIRSH,	)	
	)	
Petitioner.	)	ON WRIT OF
v.	)	CERTIORARI TO
	)	THE UNITED
MARTINDALE-HUBBELL,	)	STATES COURT
INC.,	)	OF APPEALS FOR
	)	THE NINTH
Respondent.	)	CIRCUIT
	)	

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

With exceptions immaterial to the resolution of the issues presently before the Court, Respondent Martindale-Hubbell, Inc. ("Martindale-Hubbell") concurs with Petitioner's Statement of the Case and Statement of Facts.

REASONS FOR DENYING THE WRIT

Petitioner brought this action against Martindale-Hubbell alleging, inter alia, that Martindale-Hubbell is engaged in "tying" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The alleged tying arrangement is Martindale-Hubbell's "subscription requirement." The subscription requirement is a policy of Martindale-Hubbell pursuant to which each contract for the purchase of advertising space for a

"professional card" also includes the purchase of a subscription to the Directory. Advertising is the alleged tying product, the Directory is the alleged tied product, and the subscription requirement is the alleged tie-in.

The principal issue addressed by the courts below was whether the Martindale-Hubbell Law Directory (the "Directory") and advertising therein constitute one product or two separate products. In order to resolve this issue, the lower courts analyzed the "function of the aggregation." App. 10, 47 (citations to the opinions of the courts below are to the Appendix to the Petition for Writ of Certiorari) (quoting Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), cert. denied 405 U.S. 955 (1972)). Martindale-Hubbell urged

and the courts below found that the Directory and advertising therein function together to generate referrals for advertising attorneys. App. 11, 46. Law firms place "professional cards" (essentially ethical display advertising) in the Directory, which are then circulated to other lawyers who receive the Directory. Professional cards are the advertising; the Directory is the medium. The value of the advertising depends directly upon the circulation of the Directory. The larger the circulation of the Directory among likely sources of law business, the more valuable the advertising. The subscription requirement assures each advertising lawyer that his advertisement will be circulated to every other advertising lawyer. The subscription requirement thereby enhances the

value of professional cards to advertisers and potential advertisers.

The purpose of the subscription requirement is decidedly not simply to sell more Directories. It is admitted that Martindale-Hubbell loses money on every directory it sells.[1] App. 18.

Thus, the Directory and advertising function as a single commercial unit--a lawyers' advertising and referral service. Without adequate circulation of the Directory, the advertising space would be less

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[1] This is not unique or even unusual among publishers of advertising media. Both news magazines and newspapers, for example, depend upon advertising revenue to support themselves. The most striking illustration of this phenomenon is commercial television, which is literally given away in order to create a widely distributed advertising medium.

valuable, and without the advertising the Directory would be less valuable. See App. 13. The courts below therefore concluded that professional cards and the Directory constitute a single product.[2]

This Court has not previously considered an alleged tying arrangement involving items so functionally interrelated as to constitute a single product. Lower court decisions, however, are consistent

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[2]Petitioner has repeatedly urged, here and in the courts below, that this reasoning is somehow circular, that is, that the tie is being used to justify the tie. Petition for Cert., 26, 35-37. This is false. That the value of the advertising depends directly on the circulation of the Directory is an undisputed fact. The subscription requirement merely recognizes and accommodates this reality by combining the sale of these commercially and economically inseparable components.

with the holding in this case.

In Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961), defendant manufactured and sold patented silos and unloaders for feed and grain storage. Because of a high incidence of complaints concerning the unloader when it was not used in conjunction with defendant's silo, defendant refused to sell unloaders except to those who also purchased or already owned silos of defendant's manufacture. The trial court directed a verdict in favor of defendant. The Court of Appeals affirmed.

> We may agree with the plaintiff that the compulsory joining of two "separate" articles is a per se violation of the Act . . . . Articles, though physically distinct, may be related through circumstances.

> The sound business interests of the seller, or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. . . . Whatever may be meant by per se, we must first consider what may fairly be treated by a seller as inseparable.
> 292 F.2d at 655.

In Principe v. McDonalds Corp., 631 F.2d 303 (4th Cir. 1980), plaintiffs, franchisees of defendant, alleged that defendant's policy of requiring franchisees to lease premises for their restaurants from defendant constituted an unlawful tying arrangement. The court analyzed defendant's business methods and marketing approach in detail and concluded that the trademark, the premises, and the method of doing business were so interrelated as to constitute a single product.

> . . . [T]he modern franchisee pays not only for the right to use the trademark but for the right to become a part of a system whose business methods virtually guarantee his success. . . .
>
> . . . Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie-in exists as a matter of law. . . .
>
> * * *
>
> . . . To characterize the franchise as an unnecessary aggregation of separate products tied to the McDonalds name is to miss the point entirely.
> 631 F.2d at 309, 311.

See also Kugler v. Aamco Automatic Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 560 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

Thus, the holding of the Court of Appeals in this case that "where, as here, the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller, in the present case, advertising, no tying arrangement is present" (App. 14) is neither unprecedented nor in conflict with other lower court decisions.

In support of his contention that this case warrants review by this Court, Respondent challenges two statements contained in footnote 19 of the opinion of the Court of Appeals. This footnote is appended to a discussion of two reasons tying arrangements have been viewed with disfavor. The footnote simply examines two additional reasons--intrusion upon consumers' freedom of choice and the "leverage

theory"--and rejects them. If the lower courts had found that Martindale-Hubbell's subscription requirement constitutes a tying arrangement, this reexamination of the rationale for prohibiting such arrangements might have been pertinent. But in view of their ultimate conclusion that no tie exists, the observations challenged by Petitioner are nothing more than obiter dicta and, therefore, do not require or merit this Court's review.

Petitioner's final contention is that the courts below incorrectly applied the "function of the aggregation" test. Petition for Cert., 38-40. This contention, even if it were true, would provide no basis for review by this Court. Numerous courts confronted with this issue have examined the functional interrelationship of the components present in order to

determine whether separate products are involved. See, e.g., Moore v. James H. Matthews & Co., 550 F.2d 1207, 1214-15 (9th Cir. 1977); Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252-54 (4th Cir. 1971); Telex Corp. v. International Business Machines Corp., 367 F. Supp. 258, 347-48 (N.D. Okla. 1973), aff'd in part, rev'd in part on other grounds, 510 F.2d 894 (10th Cir.), cert. dism'd 423 U.S. 802 (1975). See also Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). To review each of these decisions to assure complete uniformity of application would be impossibly time-consuming and would little advance the interpretation of the antitrust laws. This dispute, although important to the parties directly involved, has no

particular public significance. Therefore, the remote possibility that both courts below erred in determining that only one product is present in this case does not warrant review by this Court.

For the foregoing reasons, Respondent requests that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED this 8th day of October, 1982.

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